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Extramarital Relationships and the Theoretical Rationales for the Joint Property Rules – A New Model

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ABSTRACT

This Article considers the weight of extramarital relationships in determining the distribution of family property. Under the U.S. legal system, opinions differ as to whether this fault should be a factor in distribution of family property. The controversy is influenced by and arises from an earlier disagreement that followed the "no-fault" revolution of the 1970s, which focused on the role of fault in divorce proceedings. The discussion of fault with regard to property distribution took place without in-depth consideration of the underlying basis and rationales for the principles of joint property and, even more importantly, without relating to their modern, theoretical and current bases. This Article fills this void, clarifies the modern bases for the principles of joint property, and, through them, sheds new light on the role of fault. This analysis produces a new model for examining the relevance of fault in property distribution.

In order to clearly and precisely focus on the theoretical rationales for joint family property and the establishment of a new model, this Article also examines the Israeli legal system. At the end of the 1970s, one court decision determined, without explanation, that extramarital relationships are not a relevant consideration in property distribution. Subsequent rulings cited this decision without further discussion. This Article seeks to bridge the gap in the Israeli legal system as well. For that purpose, the Article analyzes the theoretical bases of property distribution principles under both Israeli law and Jewish religious law, including the ways in which these legal systems each relate to extramarital relationships. This Article questions whether the

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strong position of the Israeli court is consistent with the modern theoretical bases for joint property. These doubts are strengthened by the fact that there is no other practical way to compensate one spouse who has been harmed by the extramarital relationship of the other spouse.

Developments and new approaches in family law that are relevant to our discussion include matters such as: divorce without fault but by demand – a relationship terminable at-will; removal of fault as a relevant factor in divorce proceedings; modern theoretical bases for joint property such as the values of labor, reward for work, morality and equality; societal perceptions of the family unit; the realization that the no-fault divorce revolution was detrimental to the family unit; disappointment in tort law as a means for responding to harm resulting from extramarital relationships, and more. In light of these developments, a need has emerged to renew the balance among the relevant values and to offer a new model for weighing fault in family property distribution.

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INTRODUCTION

Extramarital relationships are not a new occurrence in married life. At the beginning of the nineteenth century, they were the most common cause of divorce between spouses,[1] and today they continue to be widespread.[2] Human history has looked upon this phenomenon severely and imposed harsh punishments on the spouse who is the "wrongdoer": "Human civilization has long maintained legal consequences for the marital love triangle. We know, for example, that primitive societies punished adultery with severe penalties. It is also well known that Hebraic law specifically proscribes adultery, in the Seventh of its Ten Commandments. . . . Classical culture also forbade extramarital affairs."[3] In recent history, the legal system has undergone significant change.[4] In this Article, I review how the law addresses extramarital relationships with respect to the distribution of family property. I examine the theoretical and modern bases for joint property and suggest a new and appropriate model for its distribution. Accordingly, this Article investigates and examines the dramatic transitions that took place within the legal systems of the United States during the last four decades, starting with the exclusion of fault from divorce and ending with the change in the consideration of fault in property distribution. The Article also presents the positions of Israeli law and Jewish religious law on these matters. The analysis will provide a broad perspective and assist in offering a new model for balancing the values that impact consideration of fault in property distribution.

The discussion of extramarital relationships requires conceptual clarification of the term "fault" in family law. This term is primarily used in tort law, where its meaning is inappropriate or unreasonable behavior. In family law, vagueness surrounds this term. Nevertheless, "fault" can, in principle, be divided into three categories: "economic fault," expressed by inappropriate economic behavior, such as lack of contribution to the family effort, waste of the family's assets, etc.; "violent fault," expressed in physical or psychological violence of one spouse towards the other; and, finally, "sexual fault," ex-

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1. Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 610 (1997).

2. Studies in the United States show that 40-50% of women have extramarital "affairs." *See* Robert R. Bell et al., *A Multivariate Analysis of Female Extramarital Coitus*, 37 J. MARRIAGE & FAM. 375, 380 (1975). Another study reveals that about 70% of men under age forty state that they do not negate the possibility that they will be involved in an extramarital affair. LYNN ATWATER, THE EXTRAMARITAL CONNECTION: SEX, INTIMACY, AND IDENTITY 15 (1982). An additional study shows that more than half of the people involved in the study had had an extramarital affair at least once. CONSTANCE AHRONS, THE GOOD DIVORCE: KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART 101 (1994).

3. Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 724 (2004).

4. Guido Tedeschi, *The Family Crisis and Traditionalists*, *in* LEGAL STUDIES IN MEMORY OF AVRAHAM ROSENTHAL 282 (Guido Tedeschi, ed., 1964).

pressed by inappropriate sexual behavior of one of the spouses, primarily a romantic extramarital relationship. This Article devotes its discussion to this third category of fault – specifically, extramarital relationships. A portion of the following discussion is also relevant to other behaviors within a marital relationship, but these behaviors might be treated differently than extramarital relationships.[5]

Clearly, the matter raises not only a technical-arithmetic question with respect to the determination of property distribution. It is also influenced by worldviews, values, and societal perceptions of the family unit and the appropriate commitment to a relationship. In addition, it is inherently impacted by developments that have taken place in the western world. Thus, as long as society views marriage as an important public institution, society will allow itself to determine under which circumstances a marriage can be dissolved and the price that will be paid by the person at fault for its dissolution. In contrast, if society views marriage as a private institution, fault for its dissolution will be regarded more leniently. Either way, it is impossible to examine these issues without first understanding the principles of joint family property and their theoretical rationales.

I. PROPERTY DISTRIBUTION AND EXTRAMARITAL RELATIONSHIPS – THE LAWS IN THE UNITED STATES

A. The System of Family Property Distribution

Family law in the United States is included under state law and the independent legislation of each state.[6] In the past, most states distributed the property acquired during a marriage (hereinafter "the family property") according to the traditional principles of common law.[7] Those states treated family property as the separate property of each of the spouses, unless the spouses took steps to transform it into joint property.[8] This system left most

5. The distinction between the different kinds of fault has much practical significance beyond the analytical differentiation. From the normative foundation of the laws of property between spouses, it follows that the influence of fault should change according to the type of fault. The various types of fault are different from one another on several levels: the types differ in their intensity and severity, they vary in impact on the "innocent" spouse, and they vary in the way in which the laws relate to them, etc. For a broader discussion, see Ruth Halperin-Kaddari, *Moral Considerations in Family Law and a Feminist Reading of Family Cases in Israel*, *in* READINGS IN FEMINISM, GENDER AND LAW 651 (Barak-Erez et al. eds., 2007).

6. *See, e.g.*, Simms v. Simms, 175 U.S. 162, 167 (1899) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of [each] state, and not to the laws of the United States."); *see also* Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

7. Am. L. Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 20, 19 (2001).

8. *Id.*

of the family property in the hands of the individual who actually purchased it and registered it.[9] In contrast, the system of joint property was established in several states. The joint property regime sets forth the opposite assumption: all profits accumulated by the spouses during the marriage are family property (also referred to as community property).[10] Each spouse is entitled to one-half of such property. In the states that applied this system, joint property is obligatory, so the value of the property, and not the actual ownership, is divided in half.[11] These states use alimony as a means of balancing the property division between the spouses when no property is available.[12]

Later, the "common law" states shifted to a property regime that distributes family property according to a different doctrine called equitable distribution. Equitable distribution requires that the court weigh many parameters[13] and attempt to divide family property in a fair and just way that is not necessarily equal.[14] It certainly would be possible that the portion allocated to a mother who was a housewife and gave up her personal career development would be greater than half of the family property but it could also be less than that.[15] Five of the "joint property" states followed the common law regime's lead and also adopted the system of equitable distribution rather than equal distribution. The system of equitable distribution is the system prevailing today throughout the United States, except for three states that remain under the system of equal distribution.[16] Under some circumstances,

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9. Support payments (originally called "spousal maintenance" or "spousal support" and later "alimony") were a means of providing monetary assistance that was aimed at compensating the woman for the imbalance in property distribution. *See* Roderic Duncan, *Alimony: What You Need to Know Before Divorce*, NOLO, http://www.nolo.com/legal-encyclopedia/alimony-what-you-need-know-30081.html (last visited Mar. 7, 2015).

10. *See* Am. L. Inst., *supra* note 7, at 20.

11. *See id.* at 20.

12. *See* Adriaen M. Morse Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 642 (1996) ("In view of the lack of property available to most couples for division upon divorce, alimony should become the courts' primary tool in fixing equitable results upon divorce.").

13. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 307 [Alt. A], 9A U.L.A. (1973) (including parameters such as "age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, . . . and the opportunity of each for future acquisition of capital assets and income"); *see also* Am. L. Inst., *supra* note 7, at 19-24.

14. *See, e.g.*, N.D. CENT. CODE ANN. § 14-05-24 (West 2013) ("When a divorce is granted, the court shall make an equitable distribution of the property and debts of the parties.").

15. *See, e.g.*, Giammarco v. Giammarco, 959 A.2d 531, 532-34 (R.I. 2008) (affirming the lower court's grant to wife of only 35% of the family property, reasoning that she assisted less in acquiring it).

16. Am. L. Inst., *supra* note 7, at 20.

the system of equitable distribution makes the payment of alimony after a marriage unnecessary.[17]

However, the consensus among equitable distribution states is not very broad. In states that previously employed joint property, joint property principles still apply during the marriage. In other words, throughout the marriage, the spouse in whose name the property is registered is not entitled to sell the property because joint rights exist throughout the marriage. In contrast, states that were "common law" states maintain the traditional concept of separation of property during the marriage, up until the time of divorce.[18] These different perspectives bring about different results when determining equitable distribution.

Thus, for example, the system of equitable distribution struggles with how to categorize property registered in the name of one spouse prior to the marriage. States in which the joint property system was formerly in place tend to include such property in the joint property, while the "common law" states tend to view it as separate property.[19] The customary default in the equitable distribution system is equal distribution. This default is more established in states where inherited property or property purchased prior to the marriage is excluded from family property.[20] For example, California determines equal distribution in every situation but, at the same time, specifically excludes separate personal property from family property.[21] In contrast, New York considered revolutionizing its system by transitioning from the separate property regime to the equal distribution regime.[22] In the end, New York reached a compromise and adopted an intermediate solution – the system of equitable distribution.[23] Ten years later, these concepts are virtually indistinguishable.[24]

In most states, the default in the system of equitable distribution is equal distribution. Thus, the primary question is identifying when it is appropriate for a court to distribute property in an *unequal* manner. With respect to our discussion, this is a question of which behaviors a court is allowed to consid-

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17. Brooke Grossman, Note, *The Evolution of Equitable Distribution in New York*, 62 N.Y.U. ANN. SURV. AM. L. 607, 625 (2007) ("Equitable division of assets acquired during the marriage replaced alimony, the traditional method of support. The purpose of equitable distribution was to 'recognize that when a marriage ends, each of the spouses . . . has a stake in and a right to a share of the marital assets accumulated while it endured.'").

18. *See* Am. L. Inst., *supra* note 7.

19. *Id.* at 19-21.

20. *Id.* at 20-21.

21. CAL. FAM. CODE §§ 760, 770, 2550 (West 2014).

22. Grossman, *supra* note 17, at 609-14.

23. *Id.*

24. *See id.* at 608 ("Although hailed as a radical change, the equitable distribution statute was actually a political compromise between reformers who wanted to establish a system of equal distribution and those who did not want to change the property distribution scheme at all.").

er in determining property distribution. Clearly, the answer is not a simple one. Because state laws give broad discretion to the courts, case law varies by state and does not provide clear criteria. Moreover, in the last two decades, additional elements have been considered in the distribution of family property, such as earning capacity, reputation, and personal capital.[25] These elements contributed to changes in delineating property distribution and made the determination of guidelines even more complicated. Certainly the answers to the question of when it is appropriate to distribute property in an unequal manner are also impacted by how society views the family unit[26] and the roles and commitments of each of the spouses in the family.[27]

B. The No-Fault Divorce Revolution

Before examining how U.S. law addresses fault in property distribution, this Article begins with a brief description of the legal issue that precedes it and greatly impacts it – considerations of fault in divorce proceedings themselves. For many years, the customary system of divorce gave consideration to the fault of each party. Accordingly, a spouse was entitled to petition for dissolution of the marriage only if the spouse showed that the other spouse was at fault.[28] That fault could be based on an extramarital relationship, desertion, physical cruelty, and more. A spouse was not entitled to petition for divorce only because he decided that he could no longer get along with or no longer loved his spouse.[29] Paradoxically, even if both spouses reached such a conclusion, they were not entitled to file jointly for divorce unless one of them was found to be at fault. These limitations reflected the strong public interest in preserving marriage as a foundation and a basis for societal development.[30] This interest was also expressed in United States Supreme Court

25. *See, e.g.*, Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59 (2001).

26. *See* Desnoyers v. Desnoyers, 530 N.Y.S.2d 906, 908 (N.Y. App. Div. 1988) ("[Equitable distribution] was not designed to punish parties for their actions but to treat the marriage as an economic partnership and recognize each party's contribution thereto.").

27. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994) (including each spouse's contribution to the harmony and stability of the marriage as factors for equitable division of marital property).

28. Allen Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 379 (2001) ("For most of the history of the United States, it was difficult to dissolve a marriage because plaintiffs had to prove that their spouses had committed acts that constituted fault grounds for divorce.").

29. JUDY PAREJKO, STOLEN VOWS: THE ILLUSION OF NO-FAULT DIVORCE AND THE RISE OF THE AMERICAN DIVORCE INDUSTRY 72 (2002).

30. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1471 (1992).

decisions such as *Maynard v. Hill*.[31] Narrowing the availability of divorce proceedings and limiting divorce to circumstances based upon fault reflected this interest.[32]

But the fault limitation raised a great amount of criticism throughout the United States.[33] Critics argued that the fault requirement causes hostile divorce proceedings, intensifies the animosity between the spouses,[34] encourages false testimony,[35] leads spouses to create a "conspiracy" of fault in order to be granted a judgment for divorce,[36] forces spouses to live together even though there is no meaningful relationship between them, and eventually brings about contempt for the legal process.[37] In addition, sociological studies show that marriages can dissolve as a result of differences between spouses in their approaches to life, differences in personalities, or due to other difficulties, and do not necessarily dissolve as a result of one or more behavioral events.[38]

As stated previously, family law is subject to the independent legislation of each state,[39] although various national entities meet from time to time to formulate legislative proposals, which are proposed in multiple states. Each state determines whether or not to adopt these proposals in their legislation. For example, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") appointed a committee to formulate a uniform code on

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31. 125 U.S. 190, 211 (1888) ("[Marriage] . . . is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.").

32. *See* Brown v. Brown, 281 S.W.2d 492, 498 (Tenn. 1955).

33. Peter Nash Swisher, *The ALI Principles: A Farewell to Fault – But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 213 (2001).

34. Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 741 (1994).

35. Parkman, *supra* note 28, at 384.

36. Michelle L. Evans, Note, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465, 473-74 (2009). Especially well known is the case of a woman who was hired by one hundred husbands to help them create documented instances of adultery in order to ensure their respective divorces. *Id.* at 473.

37. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 191 (1989).

38. Michael Grossberg, *How to Give the Present a Past? Family Law in the United States, 1950–2000*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 3, 17-18 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000).

39. *See, e.g.*, Simms v. Simms, 175 U.S. 162, 167 (1899) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of [each] state, and not to the laws of the United States."); *see also* Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

matters of marriage and divorce.[40] This committee drafted the Uniform Marriage and Divorce Act ("UMDA"), which was approved in 1970.[41] This uniform code recommended transitioning to a system of no-fault divorce, divorce after a separation period of 180 days, or divorce in the event of difficult differences of opinion.[42] Concurrently, society's view of the family unit transformed, and marriage was no longer seen as a single unit with one heart, but rather as a partnership between two individuals, each with his or her own desires and aspirations.[43] The UMDA, therefore, reflected the view that it should be possible to end a marriage according to the will and initiative of either of the spouses when the marriage no longer fulfilled the spouses' needs and ambitions.[44]

The no-fault divorce revolution swept through all the states. California was the first state to legislate the system of no-fault divorce.[45] One after another, states incorporated the recommendations in their legislation, and by 1985 every state had adopted no-fault divorce.[46] From that time on, every spouse has been entitled to file for a divorce judgment, even if the other spouse neither desires a divorce, nor is found to be at fault. The terminology of fault in divorce proceedings was replaced with the terminology of lack of fault. Terms such as "unbridgeable gaps," "incompatibility," "irreparable marital crisis," and "willful separation for a period of time determined by law" became the relevant terms in divorce proceedings. States hoped that the no-fault divorce revolution would make it easier for families in crisis and would expedite the dissolution process. In many instances, no-fault divorce made discussions of fault at divorce proceedings unnecessary.[47]

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40. *See Marriage and Divorce Act, Model Summary*, NAT'L CONFERENCE OF COMM'RS ON UNIF. ST. LAWS, http://www.uniformlawcommission.com/ActSummary.aspx?title=Marriage and Divorce Act, Model (last visited Mar. 7, 2015).

41. *Id.*

42. *Id.*

43. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

44. *See* Bradford, *supra* note 1, at 611.

45. Evans, *supra* note 36, at 474.

46. Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 612 (2006) ("By 1985, all fifty states had some form of no-fault divorce in place.").

47. *See* Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722-23 (1997); *see also* N.C. GEN. STAT. ANN. §§ 50-5.1, 50-6 (West 2014). *But see* Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 661 (1994) ("Thirty states currently retain fault grounds while also affording no-fault alternatives.").

C. The No-Fault Divorce Revolution – The Shattered Dream

About thirty years following the long awaited revolution, everyone was able to see and internalize the contribution that the revolution made to the rise in the divorce rate. This increase in the divorce rate is not surprising since the institution of marriage can be dissolved today upon the sole initiative of either of the spouses, even if the other spouse's behavior was exemplary.[48] The legal limitations that were previously imposed on the spouse who desired to end the marriage were removed and divorce procedures became relatively easy to accomplish. The spouse who desires a divorce does not have to prove that the other spouse is at fault; it is sufficient for that spouse to state that he wants to end the marriage. In comparison, the spouse who desires to continue the marriage, even if the other spouse is at fault, is in a detrimental position no matter how the matter is concluded. On one hand, the committed spouse cannot avoid the dissolution of the marriage at the initiative of the spouse who is at fault. On the other hand, if the spouse desires to initiate a divorce on her own, she cannot argue that the fault of the other spouse is a consideration in her favor.

This revolution, which made it easier to initiate a divorce proceeding, contributed to a lack of stability and certainty within a marriage.[49] The revolution also contributed to the weakening of the social sanctions against divorce. Divorce proceedings did not become more moderate, as those who had demanded and awaited the revolution had hoped. On the contrary, the proceedings following divorce continued to increase and became no less hostile.[50] Moreover, sociological studies demonstrate that economic difficulties, poverty, medical problems, and a high death rate affect divorced spouses at a higher rate than married spouses.[51] Thus, it can be argued that the increase in divorces following the no-fault divorce revolution has been harmful to the quality of life within this population.[52]

In light of these negative phenomena, many American scholars began criticizing the no-fault divorce revolution and some of them even argue that it

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48. *See* Wardle, *supra* note 34, at 766.

49. *See* Lynn D. Wardle, *Marriage and Domestic Violence in the United States: New Perspectives About Legal Strategies to Combat Domestic Violence*, 15 ST. THOMAS L. REV. 791, 801-05 (2003).

50. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU. L. REV. 79, 102 (1991). It is also worth noting that approximately 90-95% of divorces before the revolution were uncontested. *Id.* at 103.

51. Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J.L. & FAM. STUD. 5, 8-9 (2002).

52. *See id.*; *see also* Lynne Marie Kohm, *Does Marriage Make Good Business? Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 587 (2004).

has failed.[53] Studies show that half of Americans today do not prefer the changed divorce laws and would prefer a return to restricting the availability of divorce.[54] Certain states even adopted and legislated a new institution called "covenant marriage," which entitles spouses, at their own initiative, to limit future divorce and allow for it only on the basis of fault.[55] On the other hand, we are not certain whether the fault concept prior to the no-fault divorce revolution, which did not enable spouses to divorce, really contributed to well-being in marital life. Scholars continue to deal with this revolution: some oppose it while others support it.[56] However, for the purpose of this Article, this overview is sufficient. The focus here is to understand the background and changes that took place in divorce proceedings with respect to fault and to analyze the new approaches that followed the removal of fault from divorce proceedings.

D. Fault in Property Distribution – The Laws in the United States

Until 1968, all of the states weighed fault in determining family property distribution, just as they weighed fault in their decisions to grant divorce.[57] With the conclusion of the no-fault divorce revolution, states considered whether to broaden the principles of no-fault and to apply them to property distribution as well.[58] Articles 307 and 308 of the UMDA[59] provided that

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53. *See, e.g.*, COUNCIL ON FAMILIES IN AM., INST. FOR AM. VALUES, MARRIAGE IN AMERICA: A REPORT TO THE NATION 1 (1995), *available at* http://www.americanvalues.org/search/item.php?id=24 ("The divorce revolution – the steady displacement of a marriage culture by a culture of divorce and unwed parenthood – has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.").

54. *See* Parkman, *supra* note 28, at 398.

55. The states are Arkansas, Arizona, and Louisiana. *See* ARK. CODE ANN. § 9-11-804 (West 2014); Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31, 31-32, 39, 43 (1999-2000).

56. *See* Bradford, *supra* note 1, at 607-08.

57. *See* Arnold v. Arnold, 174 P.2d 674, 676 (Cal. Ct. App. 1946) ("It obviously follows that where the divorce is granted on the more heinous ground of adultery as well as for extreme cruelty the amount awarded to the innocent party should be greater than if granted on the ground of cruelty alone."); *cf.* Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, *in* RECONCEIVING THE FAMILY 9, 10 (Robin Fretwell Wilson ed., 2006) (indicating that by 1970, a trend had developed "against considering fault in making . . . financial awards").

58. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 782 (1996) ("Essentially all the American states moved to laws that allowed divorce on no-fault grounds in the 1970s and early 1980s, and as they did so they made choices about whether to apply the no-fault principle to property and alimony as well. Few have revisited those choices.").

both family property distribution and alimony be determined without considering inappropriate behavior during the marriage. The same was set forth in the Uniform Marital Property Act ("UMPA"). To those recommendations we can add the American Law Institute's Principles of the Law of Family Dissolution ("ALI Principles").[60] While the ALI Principles are not legislation, they have significant impact on state legislation.[61] The ALI Principles – built upon the UMDA and the UMPA recommendations – attempted to complete the no-fault revolution[62] and determined that fault should not be considered in the distribution of family property.[63] The rationale at the foundation of these rules is supported by three elements: (a) the uniformity and consistency that were obtained with the no-fault divorce revolution; (b) the fact that the system of compensation through property was intended as compensation only for economic damage, and not as compensation for inappropriate behavior; and (c) the cancellation of immunity from claims between spouses, allowing for a tort claim to be brought against a spouse for inappropriate behavior during the marriage.[64]

As mentioned, most states shifted to the system of equitable distribution. However, states differ in their frames of reference and that impacts the default; states that perceive family property as joint property adopt equal distribution as a default in the equitable distribution system. According to this approach, rather than transferring property from one spouse to another, the court divides the property between its owners. These states tend not to weigh fault in property distribution:

> As common-law states moved from the traditional title system to the modern system of equitable distribution of marital property, some also internalized the community property view that the spouses jointly own property acquired during marriage through the labor of either of them. Under this view spousal claims on the property at divorce are legal rather than equitable: The court is not transferring assets from the true owner to his or her spouse in recognition of the claimant's compelling

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59. Unif. Marriage and Divorce Act §§ 307, 308(b), 9A U.L.A. 288-89, 446 (1973).

60. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, ch. 1, topic 2, I (2002) [hereinafter ALI PRINCIPLES]; *see also* Ellman, *supra* note 58, at 776.

61. *See* Swisher, *supra* note 33, at 217 ("First, it is important to note that this particular ALI project is not a Restatement of the Law, but instead proposes various 'principles' of family law which 'give greater weight to emerging legal concepts than does a Restatement.'").

62. *See* Katherine Shaw Spaht, *Postmodern Marriage as Seen Through the Lens of the ALI's "Compensatory Payments"*, *in* RECONCEIVING THE FAMILY, *supra* note 57, at 249.

63. ALI PRINCIPLES, *supra* note 60; *see also* Evans, *supra* note 36, at 479 ("According to the American Law Institute, noneconomic fault – such as adultery, cruelty, or abandonment – is not a legitimate consideration during the divorce proceeding.").

64. ALI PRINCIPLES, *supra* note 60.

> equitable claims, but is rather dividing the property between its two joint owners, an exercise in which the marital misconduct of the parties seems largely irrelevant.[65]

In contrast, states that base equitable distribution on the traditional principles of common law do not adopt equal distribution as a default, but rather adopt the separation of property as a default.[66] According to this approach, the court transfers property from one spouse to another when determining property distribution. Those states tend to consider fault during property division:

> There is indeed an apparent overlap between the fifteen states that allow consideration of fault in the allocation of property at divorce and those common law states that have been most resistant generally to moving from the common law marital property system to the marital property idea of joint ownership.[67]

This Article will now examine how these recommendations, together with their various sources and the rationales for the system of family property distribution, actually influenced state laws regarding the consideration of fault in property distribution. All states, in distributing property, tend to take into consideration economic misconduct that brings about a decrease in family property.[68] However, states differ in how they evaluate fault that does not harm family property, but instead harms family values. Behaviors that are considered "fault" in this context include – but are not limited to – extramarital relationships, abandonment, and physical and mental cruelty.[69]

American legal scholars are divided over how to best categorize the states in these matters. Professor Ellman, the Chief Reporter of the ALI Principles, divides the states into five different categories according to the extent that each state considers fault during the distribution of family property and determination of alimony:

> 1. Pure no-fault – twenty states do not consider fault at all in property distribution and determination of alimony. These states adopted the approach of the UMDA.

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65. Am. L. Inst., *supra* note 7, at 43. This analysis is accepted by Professor Ellman, the Chief Reporter of the recommendations. Ellman, *supra* note 58, at 783 ("Joint ownership of marital property is nonetheless the divorce law vision of many common law states today, and their adoption of the joint ownership conception at dissolution has apparently encouraged a no-fault approach to its allocation.").

66. *See* ALI PRINCIPLES, *supra* note 60, ch. 1, topic 2, II.

67. *See* Ellman, *supra* note 58, at 783.

68. *See* Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2528 (1994); *see also, e.g.*, Smith v. Smith, 438 S.E.2d 457, 458 (N.C. Ct. App. 1994).

69. Woodhouse & Bartlett, *supra* note 68, at 2532-33, 2538.

> 2. Pure no-fault property, almost pure no-fault alimony – five states do not consider fault at all in property distribution and almost never consider fault in determination of alimony.
>
> 3. Almost pure no-fault – three states include the slight possibility of weighing fault in property distribution (such as in instances of severe violence or attempted murder).
>
> 4. No-fault property, full-fault in alimony – seven states do not consider fault at all in property distribution but do consider fault in determination of alimony.
>
> 5. Full-fault – fifteen states grant the courts full discretion to consider any inappropriate spousal behavior in determining property distribution and the level of alimony.[70]

Following this analysis, Ellman indicates that twenty-five states reject the concept of fault both in divorce and property distribution proceedings.[71] In his opinion, the remaining states should also adopt this approach.[72] Ellman's analysis has been accepted by several courts throughout the United States, and one court even indicated that the majority of American legal systems prohibit consideration of fault as a factor in property distribution.[73] On the contrary, other scholars continue to argue that the majority of states refuse to weigh fault.[74]

Scholars that criticize Ellman's analysis argue that his description does not reflect reality.[75] Peter Swisher, for example, states that if it is possible to identify a trend, the opposite trend should be endorsed – and fault should be considered in property distribution.[76] Swisher specifically disagrees with the analysis reflected in the ALI Principles and notes that most states consider

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70. Ellman, *supra* note 58, at 776, 778-80. This division into five categories was also adopted by the ALI. ALI PRINCIPLES, *supra* note 60, ch. 1, topic 2, II.

71. *See* Ellman, *supra* note 58, at 782.

72. *Id.* at 776. The ALI endorsed this position. ALI PRINCIPLES, *supra* note 60.

73. Sparks v. Sparks, 485 N.W.2d 893, 909 (Mich. 1992) (Levin, J., dissenting); *see* Havell v. Islam, 718 N.Y.S.2d 807, 810 (N.Y. Sup. Ct. 2000).

74. *See* Jeannette C. Griffo, *How Fault Remains a Factor in Property Division Upon Divorce: An Analysis of Equitable Distribution in Michigan after* Sparks v. Sparks, 71 U. DET. MERCY L. REV. 421, 450-51 (1994).

75. *See* June R. Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197, 197-98 (1991).

76. Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243, 249 (2004-2005) ("Thus, if there is an arguable majority 'trend' today, it is to retain fault factors in divorce as one of many statutory factors that state courts will still consider in determining spousal support rights, the division of marital property, or both.").

fault in property distribution.[77] Between the extreme positions of Ellman and Swisher are more moderate positions that analyze and categorize the data in a more balanced way. Thus, for example, writes Brett Turner: "[Out of the forty-nine] jurisdictions which permit the trial court to divide marital property equitably, twenty-seven do not permit consideration of fault that has no economic impact."[78] Lynn Wardle has a similar view: "[T]hirty states allow consideration of marital misconduct in both alimony and property disputes."[79]

Part II of this Article analyzes the aforementioned positions and demonstrates that the differences among scholars' categorization of the states' treatment of fault in the dissolution context arise not only from their analysis of the factual data but also from their moral views of the family structure and its role in modern society.

It is essential to emphasize that fault remains only one of the factors that is considered in property distribution. Thus, for example, the Michigan Court of Appeals reversed a lower court decision that gave a woman only a quarter of the marital property, when the decision was based on the woman's extramarital relationship.[80] The Michigan Court of Appeals stated that the lower court gave too much weight to fault and failed to consider other factors.[81] In Missouri, a court awarded a woman 63% of the property after it became clear that the husband had a child from an extramarital relationship.[82] Similarly, the Court of Appeals of Virginia granted a woman a larger portion of property due to her husband's many years of adultery, although the court considered additional factors.[83]

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77. *Id.* at 258 ("What these commentators largely ignore, however, is that thirty-five years after the so-called no-fault divorce 'revolution,' only a small minority of states – about fifteen – are 'true' no-fault jurisdictions, while a majority of states still retain alternative fault grounds for divorce, and still consider marital fault factors in determining spousal support and the distribution of marital property on divorce. Indeed, forty-two states still continue to evaluate a spouse's noneconomic contributions to the marriage and the well-being of the family, in spite of the [ALI Principles'] arguments to the contrary."). Professor Goldberg analyzes the division of states in a similar way. *See* BARTH H. GOLDBERG, VALUATION OF DIVORCE ASSETS § 1:34 (revised ed. 2005) ("Unfortunately, fault remains a major issue for consideration in many jurisdictions, even though it was presumed that with the passage of the Uniform Property Act its importance would become insignificant. However, this presumption has proved fallacious. In fact, as of 1985 only seventeen states have statutes expressly excluding marital fault from the factors to be considered upon dissolution, while sixteen states now permit it to be a factor among others to be considered, and only six remain silent on the subject.").

78. Brett R. Turner, *The Role of Marital Misconduct in Dividing Property Upon Divorce*, 15 DIVORCE LITIG. 117, 117 (2003), *available at* http://www.divorcesource.com/research/dl/division/03jul117.shtml.

79. *See* Wardle, *supra* note 57, at 15.

80. Sparks v. Sparks, 485 N.W.2d 893, 901-02 (Mich. 1992).

81. *Id.* at 901-03.

82. Huber v. Huber, 682 S.W.2d 493, 495 (Mo. Ct. App. 1984).

83. O'Loughlin v. O'Loughlin, 458 S.E.2d 323, 324-26 (Va. Ct. App. 1995).

In contrast, in other states, fault that is detrimental to the spousal relationship – such as cruelty, desertion, adultery, or humiliation – is not a relevant consideration in determining the equitable distribution of family property.[84] In those states, inappropriate spousal behavior is not a basis for punishing one spouse or awarding more property to the spouse who was harmed.[85] Swisher argues that, indeed, in many states the tendency is to ignore fault.[86] Thus, for example, in New York, fault was taken into account only in cases that "shock the conscience of the court."[87] However, the courts in New York agree that an extramarital relationship is not the type of behavior that "shocks the conscious of the court," and therefore should not be considered as a factor in property distribution.[88]

Sometimes, courts within the same state disagree as to whether the court should consider extramarital relationships in the property distribution context. Contrary to the New York decision referenced in the previous paragraph, the Virginia Court of Appeals ruled against the consideration of a husband's long extramarital relationship when the affair brought about the dissolution of the marriage but did not involve economic misconduct.[89] Ultimately, the court affirmed the lower court's decision, granting the husband 65% of the family

84. *See, e.g.*, *In re* Marriage of Muhammad, 108 P.3d 779, 780-81 (Wash. 2005); Warner v. Warner, 807 A.2d 607, 613 (Me. 2002); Hartland v. Hartland, 777 P.2d 636, 641-42 (Alaska 1989); Anderson v. Anderson, 230 S.E.2d 272, 273, 275-76 (Ga. 1976), *superseded by statute*, Divorce and Alimony – Procedures Changed, 1977 Ga. Laws 1253, 1257, *as recognized in* Davidson v. Davidson, 257 S.E.2d 269 (Ga. 1979); Sirek v. Sirek, 693 N.W.2d 896, 900 (Minn. Ct. App. 2005); Thompson v. Thompson, 811 N.E.2d 888, 921-22 (Ind. Ct. App. 2004); *see also* Dvorak v. Dvorak, 693 N.W.2d 646, 652-53 (N.D. 2005); Steiner v. Steiner, 687 N.W.2d 740, 742-43 (Wis. Ct. App. 2004).

85. *See, e.g.*, Grosskopf v. Grosskopf, 677 P.2d 814, 820 (Wyo. 1984) (citing Paul v. Paul, 616 P.2d 707, 715 (Wyo. 1980)); Young v. Young, 609 S.W.2d 758, 762 (Tex. 1980); Read v. Read, 594 P.2d 871, 872 (Utah 1979); Wilberscheid v. Wilberscheid, 252 N.W.2d 76, 81 (Wis. 1977).

86. *See* Swisher, *supra* note 33, at 224-25 ("Therefore, the current judicial trend in many states is that most judges tend to ignore or severely limit the ultimate effect of fault-based statutory factors in divorce, except in serious or egregious circumstances."); *see also* Tarro v. Tarro, 485 A.2d 558, 561 (R.I. 1984); Perlberger v. Perlberger, 626 A.2d 1186, 1195 (Pa. Super. Ct. 1993); Platt v. Platt, 728 S.W.2d 542, 543-44 (Ky. Ct. App. 1987). *But see* Thames v. Thames, 477 N.W.2d 496, 503 (Mich. Ct. App. 1991) (citing Burkey v. Burkey, 471 N.W.2d 631, 634-35 (Mich. Ct. App. 1991)).

87. O'Brien v. O'Brien, 66 N.Y.2d 576, 589-90 (N.Y. 1985) (citing Blickstein v. Blickstein, 472 N.Y.S.2d 110 (N.Y. App. Div. 1984)); *see also* Havell v. Islam, 718 N.Y.S.2d 807 (N.Y. Sup. Ct. 2000) (quoting *O'Brien*, 66 N.Y.2d at 589-90).

88. Rosenberg v. Rosenberg, 510 N.Y.S.2d 659, 662 (N.Y. App. Div. 1987); *see also* Nolan v. Nolan, 486 N.Y.S.2d 415 (N.Y. App. Div. 1985).

89. Aster v. Gross, 371 S.E.2d 833, 836 (Va. Ct. App. 1988) ("Circumstances that lead to the dissolution of the marriage but have no effect upon marital property, its value, or otherwise are not relevant . . . [and] need not be considered.").

property and explaining that he earned most of it as an orthopedic surgeon.[90] An additional Virginia court followed this approach and ruled that adultery is not a relevant consideration in property distribution.[91] The same conclusion was reached in West Virginia.[92] Similarly, courts in Florida and North Carolina ruled that adultery should not be considered in property distribution but should be considered in the determination of alimony.[93]

II. EXTRAMARITAL RELATIONSHIPS AND PROPERTY DISTRIBUTION – THE NORMATIVE VIEW

Part I of this Article examined the role of fault – specifically extramarital relationships – in property distribution regimes. This part discusses the theoretical basis for weighing extramarital relationships in property distribution. Within this part, the four sections progress step-by-step: the first examines the moral argument; the second presents a dilemma facing the moral argument; the third reviews the impact of a lack of clear guidelines for weighing extramarital relationships in property distribution; and the fourth discusses which legal field should deal with the fault of spouses.

A. The Moral Argument

As previously stated, the disagreement among scholars in classifying states' consideration of fault in family property distribution is not only factual but also reflects underlying moral and ideological perspectives. This discussion centers upon the role of the family unit and the weight of moral arguments in family law. On one side of the discussion is Ellman, who argues that most of the states exclude consideration of fault from property distribution.[94] The proposals suggested by Ellman are also incorporated in the ALI Principles. On the other side of the discussion are the many other scholars

90. *Id.* at 835-36.

91. *See* Gamer v. Gamer, 429 S.E.2d 618, 622 (Va. Ct. App. 1993) (citing *Aster*, 371 S.E.2d at 836) (finding that any adultery committed by the husband "had no economic impact upon the parties' property, nor did it affect the value of the marital assets").

92. W. VA. CODE ANN. § 48-7-103 (West 2014) (mandating that courts presume equal division of marital property between the parties but allowing alterations to such distribution "without regard to any attribution of fault").

93. *See* Tuller v. Tuller, 469 So. 2d 212, 213 (Fla. Dist. Ct. App. 1985) (Cowart, J., dissenting); *cf.* Shoffner v. Shoffner, 371 S.E.2d 749, 751 (N.C. Ct. App. 1988) (reasoning that the court's consideration of one party's "failure to assist in the compilation and valuation of marital property during litigation" – thereby causing the opposing party to incur additional expenses – was "equivalent to the proper consideration of marital misconduct . . . related to the economic condition of the marriage as a factor in making the distributive award").

94. *See* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 23 (1989); Ellman, *supra* note 58, at 807.

who disagree with Ellman. Morse, for example, argues that Ellman does not give credence to the moral aspects and instead favors only the consideration of the economic aspects.[95] Morse further asserts that the consideration of fault is an "excellent tool" both for encouraging appropriate behavior and for deterring inappropriate behavior.[96] In his opinion, most of society views extramarital relationships as inappropriate behavior, and he argues that a financial cost to the individual at fault could disincentivize such behavior.[97] As expressed in his words:

> . . . fault provides an excellent tool to encourage the type of behavior society believes to be appropriate in marriage, and to discourage that behavior which society deems to be inappropriate. It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of sharing behavior which marriage should have to endure. In order to provide a disincentive for such behavior, there should be concomitant post-divorce financial consequences for engaging in inappropriate behavior.[98]

Karen Boyd adds that it is morally wrong for an adulterous spouse to retain half of the property.[99] Boyd argues that this result sends a clear message to society that adultery is acceptable behavior: ". . . when a spouse who commits adultery leaves the marriage with half or more of the family's assets, as may occur within the current pure no-fault schemes, an injustice is done. The message is clear – it is acceptable to have an extramarital affair."[100]

Laura Bradford writes that reconsideration of fault in divorce proceedings, as well as in property distribution, meets the customary expectations of society: "[Reintroducing the fault concept] back into divorce [as well as] into the division of assets and [spousal support] after divorce satisfies the popular expectation that society will reward those who observe their marital vows and commitments."[101] Lawrence Golden adds that even if one agrees – in theory – that fault should not be considered in property distribution, legislators and judges generally still give consideration to fault and award property accordingly:

> In theory fault or misconduct which is not related to the economic conditions of the parties should not be germane to a division of property. . . . Nonetheless, there is a strong feeling among legislators and judges that a "bad person" should not be rewarded, and the strength of

95. *See* Morse, *supra* note 12, at 634 (discussing other scholars' views on Ellman's theory).

96. *Id.* at 640-41.

97. *Id.* at 641.

98. *Id.*

99. *See* Boyd, *supra* note 46, at 615.

100. *Id.*

101. Bradford, *supra* note 1, at 621.

> this belief sometimes tempers rigorous adherence to abstract principles.[102]

In addition, the weighing of fault in property distribution may lessen the negative results of the no-fault divorce revolution – a revolution that has left the weaker spouse exposed to the danger of divorce without being able to prevent it: "As states began to adopt no-fault divorce laws, marriage was transformed from a permanent relationship into a relationship terminable at-will. The reformers had to make some provisions for the economic security of the family members outside of marriage."[103]

Courts have rejected the argument that consideration of fault in divorce is based on religious rationales and thereby unconstitutional.[104] Instead, courts reason that adultery harms individuals of all religions, including those who do not practice religion at all.[105] This argument adds to, and strengthens, the universal moral position that disapproves of extramarital relationships. Swisher joins this approach and argues that despite the apparent abandonment of fault in the no-fault divorce revolution, much writing about the subject of fault still exists.[106] In his opinion, this continued discussion shows that the moral element is still relevant in the context of family.[107] Swisher also indicates that legislatures and courts in most states still consider spousal responsibility in the dissolution of a marriage.[108] He argues that the refusal to consider fault comes from a different view of the family and its roles:

> Indeed, if contemporary marriage is viewed today as a shared partnership with important economic *and* noneconomic expectations, then a "true" no-fault divorce regime, as proposed in the *Principles*, reduces marriage on dissolution only to impersonal and unrealistic economic calculations, and refuses to consider many important nonmonetary marital contributions to the well-being of the family.[109]

At the same time, extramarital relationships have lost the negative label they have been given in the past. In the name of new values (privacy, autonomy and freedom), the important moral protections of the family were harmed. States that adopted these values implemented a pure approach of no-fault divorce, which imposed a great burden on the "innocent" spouse in

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102. LAWRENCE J. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY 255 (1st ed. 1983).

103. Boyd, *supra* note 46, at 620-21.

104. *See, e.g.*, Waite v. Waite, 64 S.W.3d 217, 219 (Tex. Ct. App. 2001); Wikoski v. Wikoski, 513 A.2d 986, 986 (Pa. Super. Ct. 1986).

105. Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 166 (2003).

106. *See* Swisher, *supra* note 33, at 220-21.

107. *See id.* at 219-21.

108. *Id.* at 220.

109. *Id.* at 221.

property distribution and determination of alimony.[110] According to Swisher, these legal systems are detrimental to the "innocent" spouse in two ways: first, they prevent him or her from using the other spouse's moral fault as a basis for fair negotiation, ultimately harming bargaining power;[111] second, they treat fault and no-fault in the same way, which sends a social message that the marital relationship does not demand commitment.[112]

B. A Dilemma Facing the Moral Argument

In response to the abovementioned writers, Ellman argues that the moral argument relies on the assumption that the cause of a divorce can be determined. However, that cause is not easily identified when the investigation is based on a moral criterion, which is neither scientific nor exact. Consider, for example, that some spouses are willing to forgive their partners for extramarital relationships and choose to continue their marriage, while others are not willing to do so. Therefore, when the family unit dissolves following an extramarital relationship, the question to be asked is whether the divorce is the fault of the spouse who engaged in an extramarital relationship or the spouse who could not tolerate it. In other words, is the "cause" of divorce the behavior itself or perhaps the other spouse's intolerance of the behavior? Further, couldn't the adultery that eventually brought about divorce be a reaction to a failed relationship, and therefore not the "cause" of divorce? In grappling with these questions, the New Jersey Supreme Court reversed a decision that considered a wife's adulterous relationship in determining property distribution.[113] The court explained that in the complex marriage relationship, one spouse may be acting in response to the actions of the other, so it is impossible to determine who is at fault in ending the marriage.[114]

Additional questions arise: should only intentional fault be considered or perhaps unintentional fault as well, such as infertility or mental illness? When one spouse decides to divorce because of the other spouse's illness, who will be considered the wrongdoer? Similarly, how will matters such as the refusal of a spouse to participate in relationship counseling or individual treatment be considered? From another perspective, evidentiary complications may arise: in some instances, identifying the "cause" demands extensive

110. *See, e.g.*, Mosbarger v. Mosbarger, 547 So. 2d 188, 189 (Fla. Dist. Ct. App. 1989) (completely adopting the no-fault divorce system to such an extent that it did not consider fault in a case in which the wife attempted to murder her spouse); *In re* Marriage of Cihak, 416 N.E.2d 701, 702 (Ill. App. Ct. 1981) (refusing to consider husband's murder of wife as a factor in property division).

111. *See* Swisher, *supra* note 33, at 222.

112. *See id.* at 221 (citing Morse, *supra* note 12, at 640-41).

113. Chalmers v. Chalmers, 320 A.2d 478, 480, 484 (N.J. 1974).

114. *Id.* at 482; *see also* ALI PRINCIPLES, *supra* note 60, ch. 1, topic 2, Reporter's Note a.2.c ("N.J. Stat. Ann. § 2A:34-23.1 governs the distribution of property. Marital misconduct is not among the factors the statute directs the court to consider, although the court is empowered to consider 'any other factor it deems relevant.'").

evidence from family members and friends, medical evidence, and third party evidence, all of which can complicate and prolong the divorce proceedings. Inquiry into these issues requires looking at internal family matters such as the intimate relationship between the spouses, thereby infringing on the spouses' privacy.

All of these questions raise doubt about a court's ability to determine the true origin of fault and show that when a court determines who is at fault for bringing the marriage to an end, the court does not determine the cause solely responsible for it but, instead, evaluates the relative moral failures of both spouses. In actuality, the decision of the court only evaluates who is *more* at fault and not who caused the marriage to end. The complexity of family relationships makes this evaluation difficult. As the affection between parties fades, they are less willing to tolerate each other, making the determination of fault all the more difficult. It is doubtful whether the judicial process is the appropriate tool for investigating the real cause for the separation of spouses. Furthermore, property distribution according to fault could create an incentive for the harmed spouse to dissolve the marriage in order to hurt the spouse that breached marital trust. In so doing, the harmed spouse might neglect other considerations that should be protected, such as the interest of the children and the preservation of the family unit. In light of these considerations, it is unsurprising that some courts are unwilling to weigh the relative fault while determining property distribution.[115]

Even when a court determines who is more at fault, it is unclear which criteria it uses in doing so. Without clear and defined guidelines, the court places responsibility on behavior that is not a civil wrong. If the behavior that the court punishes is a civil wrong, then tort law provides defined compensation. If not, then the use of the word "cause" is imprecise.

C. Lack of Guidelines Leads to Judicial Arbitrariness

The ALI Principles also argue that the traditional rules of fault require exceptional reliance on judicial discretion.[116] This reliance on judicial discretion is due to a lack of guidelines regarding the appropriate standard of behavior and its economic consequences.[117] While this problem is relevant to all areas of the law, its significance increases when the topic of discussion is one of morals and values. Thus, the consideration of fault hinders the attainment of greater uniformity and predictability in judicial decisions. These values are fundamental to every legal system:

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115. Lutz v. Lutz, 485 So. 2d 1174, 1177 (Ala. Civ. App. 1986) (citing Dobbs v. Dobbs, 452 So. 2d 872 (Ala. Civ. App. 1984) ("However, we do not find it necessary for the court to examine each incident of misconduct to determine who was more at fault. If there is testimony of fault from both parties, the trial court does not have to determine the relative fault of the parties when making the property division.")).

116. ALI PRINCIPLES, *supra* note 60, ch. 1, topic 2, Reporter's Note a.5.b.

117. *Id.*

> The traditional marital-fault rule requires extraordinary reliance on trial-court discretion. Neither the standard of misconduct, nor its dollar consequences, are much bounded by any rule. While in principle the trial court's decision can be reviewed for "abuse of discretion," reversals are rare. . . . The traditional fault rule is thus inconsistent with a major theme of these Principles, an effort to improve the consistency and predictability of trial-court decisions.[118]

States that consider fault fail to formulate clear guidelines for the courts. In Missouri, for example, a guideline set by the court in *Burtscher* instructed courts to consider behavior that "throws upon the other party marital burdens beyond the norms to be expected in the marital relationship."[119] Despite this guideline, the Missouri Court of Appeals refused to reverse a decision from a lower court that viewed a husband's adultery as morally equivalent to the insistence of the wife to play Bingo four nights a week.[120] Rather than apply the guideline, the court took the wife's behavior into consideration and dismissed the appeal.[121] The ALI Principles argue further that, as long as there is no defined economic harm, consideration of fault grants unlimited judicial discretion, and, in that regard, exposes the decisions in these matters to the subjective view of each judge.[122]

Swisher agrees with these arguments, and explains that they can be extended to all areas of law: there is no way to prevent the involvement of the personal view of the judge, even where clear and uniform standards are applied.[123] Family court judges implement a great deal of judicial discretion. Usually their daily experience guides them to reach fair distribution of family property.[124] It is not a question of unlimited discretion, as legislation in thirty-six states clearly defines which parameters are to be considered when determining property distribution.[125] In addition, the courts are guided and reviewed by the courts of appeals.

Actually, courts encounter inherent problems with the use of even clear guidelines. On one hand, determination of clear guidelines is detrimental to the necessary flexibility of decisions. On the other hand, a lack of clear

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118. *Id.*

119. Burtscher v. Burtscher, 563 S.W.2d 526, 527 (Mo. Ct. App. 1978) ("[T]he conduct factor becomes important when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship.").

120. *See id.* at 527-28.

121. *Id.* (noting that "[i]t is unnecessary and probably impossible to lay down any precise guidelines for the weight to be given to the conduct factor").

122. *See* Ellman, *supra* note 58, at 790.

123. *See* Swisher, *supra* note 33, at 219-23.

124. *Id.* at 223-24.

125. *Id.* at 224 n.64; *see also* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865 (2000).

guidelines leads to gaps in judicial decisions that reflect each judge's personal views about what constitutes fault in a spousal relationship. In the absence of guidelines, the judge is empowered to use family law as a tool for punishing behavior that society has chosen not to criminalize.[126] Ellman asserts that society still does not deem it proper to punish inappropriate spousal behavior because there is no broad consensus regarding the definition of such behavior.[127] As an additional concern, laws are not gender neutral: in states that take fault into consideration, the legal consequences of a wife's adultery are greater than those of a husband's adultery.[128]

D. Which Field of Law Should Deal with Extramarital Relationships?

If the purpose of the consideration of extramarital relationships in the marital dissolution context is to punish the "guilty" or compensate the victim, then tort law is well-equipped for that purpose. Claims between spouses were originally blocked by rules of spousal immunity. However, in conjunction with the no-fault revolution, states began to recognize tort claims between former spouses:

> The obvious model for such a system is the tort law, which provides compensation for harms and also permits punitive damages in certain circumstances. And indeed, since no-fault's rise in the 1970's, the tort law has changed so that most states now recognize claims between former spouses that were previously excluded by blanket rules of spousal immunity.[129]

Ellman states that the courts tried to avoid the punitive nature of weighing fault by arguing that it is only a matter of monetary compensation for economic damage caused to the spouse by the transition from one economic unit to two separate units.[130] However, this argument is unfounded because the courts that consider fault actually reward good behavior and punish the wrongdoer rather than compensate one spouse for damage caused by the other spouse.[131] Furthermore, Ellman's proposal to rely upon tort law is problematic. Experience shows that the number of such claims is very small, and

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126. *See* Ellman, *supra* note 58, at 787.

127. *See id.*

128. *See, e.g.*, *id.* at 787 n.30 ("Kentucky ([wife's] adultery may reduce alimony award, but [husband's] adultery cannot be the basis for increasing it); . . . North Dakota (trial court properly allocated 83 percent of property to [husband] after 19-year marriage, where [wife] guilty of adultery).").

129. *Id.* at 786. In the summary of his article, Ellman concludes that half of the states do not grant alimony on the basis of fault, and more than half do not consider it in determining property distribution. *Id.* at 807. Apparently the reason is that the fault can be dealt with in tort law or in criminal law. *Id.* at 807-08.

130. *Id.* at 788.

131. *See id.*

those that result in compensation are even more rare.[132] Couples generally object to continuing divorce proceedings with a tort proceeding for two reasons: first, the complication of the tort proceedings; second, a lack of capital for compensation of the injured party since insurance companies do not cover intentional damage.[133] The addition of a tort claim to a family law proceeding will also raise, among other issues, the question of which procedure should be followed.[134]

Moreover, even where extramarital relationships are a significant factor in spousal separation, there is no defined remedy for either spouse in tort law.[135] An absence of a specific statutory remedy imposes a heavy burden on the spouse who has been harmed and attempts to obtain compensation from the other spouse:

> Neither tort nor criminal law provides an adequate remedy for egregious marital misconduct[.] Finally, the absence of any fault-based statutory relief for egregious marital misconduct may place an almost insurmountable burden on an abused spouse to obtain compensatory relief from an abusive spouse. This serious problem is illustrated in a number of cases in a minority of states that have adopted a "pure" or "true" no-fault regime, where nonfinancial marital fault no longer plays any significant role in determining divorce grounds and defenses, spousal support awards, or the equitable distribution of marital property.[136]

In light of the above, Swisher believes that a state that considers adopting the ALI Principles should at the same time weigh the considerations of fault.[137] In his opinion, this matter should not be dealt with in tort law because family law is sufficiently developed to address these types of damages, and there is no need to reinvent laws that already exist.[138]

III. ISRAELI LAW – EXTRAMARITAL RELATIONSHIPS

A. Extramarital Relationships Under a Joint Property Regime

The *Dror* ruling, handed down at the end of the 1970s, serves as the primary basis for excluding the consideration of extramarital relationships

132. Swisher, *supra* note 33, at 228 (quoting Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745, 762 (1999)).

133. *Id.* (quoting Spector, *supra* note 132, at 762).

134. *See* Woodhouse & Bartlett, *supra* note 68, at 2566 ("Tort claims raise tricky questions of res judicata and collateral estoppel, the right to a jury trial, overlapping recoveries, and limitations on damages.").

135. *See* Evans, *supra* note 36, at 494-95.

136. *See* Swisher, *supra* note 76, at 254.

137. *See id.*

138. *See* Swisher, *supra* note 33, at 227-28 (citing Ellman, *supra* note 94).

from family property distribution in Israel.[139] This case concerned a couple who lived in marital harmony for about three years.[140] The husband argued that their family life started deteriorating when his wife became intimate with other men.[141] Therefore, he argued that joint property rights could neither be established by their marital relationship nor by an implied agreement between the spouses.[142] The Israel Supreme Court rejected this argument:

> Abandoning the house or adultery might create a rift between spouses and in this way terminate the sharing of property, but [the spouses] are not retroactively punished for [these actions] by taking away joint property rights. An explicit rule expressing this idea is found in the United States: CORPUS JURIS SECUNDUM 75 42.[143]

This decision gave no reason why extramarital relationships should not be considered. The reference to the explicit rule in the United States is puzzling since the law in the United States is complex and varies from state to state. The minority opinion in the *Dror* case stated that, even if the wife was adulterous, her husband forgave her after he found out about the adultery.[144] Though this fact made this case easily distinguishable, later courts relied on this decision. Indeed, this important distinction in the *Dror* decision did not prevent later decisions from relying upon it as binding precedent.[145]

However, with respect to external and personal property owned by one spouse prior to the couple's relationship, one finds an opposite ruling: extramarital relationships will bring about the exclusion of such property from joint property.[146] Consider, for example, the case of *Salem*, which dealt with common law spouses to whom the joint property rule also generally applies.[147] Mrs. Salem admitted to having an intimate extramarital relationship.[148] The court determined that this relationship did not cancel the joint

139. CA 264/77 Dror v. Dror 32(1) PD 829, 832 [1978] (Isr.).

140. *Id.*

141. *Id.*

142. *Id.* In some American jurisdictions, however, it is difficult to argue against an argument of fault with the counterargument that the parties continued to live together after the event under discussion. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-52 (West 2015); Pavel v. Pavel, 495 A.2d 1113, 1114 (1985) (holding that the trial court erred in hearing only evidence related to the final event contributing to the dissolution of the marriage and in suppressing evidence of earlier such events on the basis that the parties had reconciled).

143. *Dror*, 32(1) PD 829, at 832.

144. *Id.*

145. *See, e.g.*, CA 819/94 Levi v. Levi 50(1) PD 300, 304 [1996] (Isr.); HCJ 1135/02 Vazgial v. The Supreme Rabbinical Court 56(1) PD 14, 24 [2002] (Isr.).

146. CA 4385/91 Salem v. Carmi 51(1) PD 337 [1997] (Isr.).

147. *Id.*

148. *Id.*

property rule regarding property acquired during the relationship, but it did not allow for the consideration of external property as joint property.[149]

Another case involving external property is the case of *Anonymous A*.[150] In that case, a couple and their children lived in an apartment that belonged to the husband before the couple met.[151] The rabbinical court[152] ruled that the woman was not entitled to support payments, a portion of the apartment, nor any other residence, because she was a "rebellious wife" who had continuously betrayed her husband.[153] The woman petitioned the Israel Supreme Court and argued that, according to the joint property principles, she was entitled to half of the apartment.[154] In an opinion given by Chief Justice Barak, the Israel Supreme Court dismissed her petition.[155] The court determined that ongoing betrayal undermines the basis for harmony, and, therefore, prevented the application of joint property principles to external property.[156] However, it did not cancel the joint rights acquired during the marriage.[157]

An additional case for consideration is *Draham*.[158] The abovementioned decisions dealt with whether Israeli law requires the transfer of half the family property to the spouse who is not the registered owner – even though that spouse was disloyal. The courts determined that family property should be transferred but external property should not. The *Draham* decision, in contrast, dealt with the question of whether to apply the rules of joint property to the external property of the disloyal spouse.[159] In a majority opinion, Judge Dorner determined that the rules of joint property should be applied in their complete scope – including property acquired prior to the marriage.[160] She argued that in harmonious marriages that last for many years, this sort of property usually becomes absorbed into joint property.[161] It is difficult to avoid the impression that a desire to punish the disloyal spouse affected Dorner since, in this case, the basis for joint external property rested on a very weak rationale. Even spouses living in harmony do not tend to see an

149. *Id.*

150. HCJ 3995/00 Anonymous v. The Supreme Rabbinical Court 56(6) PD 883, 888 [2002] (Isr.) [hereinafter *Anonymous A*].

151. *Id.*

152. Under Israeli Law, family matters are under the parallel jurisdictions of the civil court and the religious court in which the presiding rabbinic judges are experts in religious law. Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279, 280-81 (2009).

153. *Anonymous A*, 56(6) PD 883.

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. CA 1880/95 Draham v. Draham 50(4) PD 865, 876 [1997] (Isr.).

159. *Id.*

160. *Id.*

161. *See id.* at 877.

external asset acquired by one spouse before marriage as a corporate asset, yet here Justice Dorner stated that an external asset will be shared despite a shaky relationship.

B. Balancing of Resources – The Property Relations Law

In 1973, the Property Relations Law was enacted in Israel.[162] The law was intended to apply to all couples that entered into marriages after 1974.[163] Under this law, the Israeli legislature established the system of delayed sharing. This system creates an absolute separation of property throughout the entire marriage. The property is divided between the spouses only in the event of divorce or upon the death of one spouse.[164] This arrangement is known as the "balancing of resources" in which sharing is obligatory.[165] "Balancing resources" is sharing the value of the property, as opposed to ownership rights, and it is delayed until the end of the marriage.[166] This sharing arrangement is implemented by evaluating the property of each spouse.[167] The spouse who has more property registered in his or her name pays half of the difference in value to the spouse in whose name less property is registered.[168] Section 8(2) of the Property Relations Law provides that if the court finds "special circumstances" it is authorized to determine that the balancing of the property value not be half and half but rather some other proportion.[169]

In the case of *Anonymous B*, the court considered whether extramarital relationships are "special circumstances" – justifying a deviation from the "balancing of resources" rule.[170] The rabbinical court held that adultery is included in "special circumstances" and that the wife should not be granted portions of the property that were accumulated in the husband's name.[171] Because issues of property should be resolved according to civil law, the rabbinical court could not base its opinion on punishment under religious law and, therefore, provided the following explanation:

> Because of the economic results of divorce due to adultery, the injured spouse will be forced, as a result of the unilateral adulterous behavior, to build another home for himself, to remarry and also to literally purchase another home . . . the economic responsibility imposed upon the injured party entitles him to leniency in the balancing of resources to

162. The Spouses Property Relations Law, 5733-1973, 27 LSI 276 (1973) (Isr.).
163. *Id.* at § 14.
164. *Id.* at §§ 5-6.
165. *Id.*
166. *Id.*
167. *See id.*
168. *See id.*
169. *Id.* at § 8(2).
170. HCJ 8928/06 High Court of Justice, Anonymous v. The Supreme Rabbinical Court (Oct. 8, 2008) (Isr.). [hereinafter *Anonymous B*].
171. *Id.*

> his benefit, whether from rights that were accumulated before the adultery or afterwards.[172]

The wife petitioned the Israel Supreme Court, which relied upon the *Dror* ruling and decided to reverse the decision of the rabbinical court: "The dissolution of every marriage has broad economic impacts. The need to 'build another home' is not unique only to couples whose marriage broke up because of adultery. This is the need of many of the couples whose marriages have come to an end."[173]

Another argument was made by Judge Rivlin in the case of *Anonymous B*:

> One cannot deal with the fault of one of the parties through economic damage in property distribution. It is often difficult to speak in terms of "fault" in this circumstance. The dissolution of marriage is the result of complex circumstances and adultery in itself does not make one of the spouses solely at fault.[174]

It seems that this is the only argument in the Israeli court decisions for not weighing extramarital relationships in property distribution, and it is compelling. This argument also parallels one of the central arguments commonly advanced in the United States, as discussed above, which this Article further examines in Part IV.

C. Jewish Religious Law

The property issues arising from a divorce are civil matters to which religious law should not be applied. However, religious law influences the rabbinical court when issues of property and adultery are brought before it. First, the theoretical basis for the property arrangement in Jewish religious law does not focus on the autonomy of the spouses as individuals.[175] Sharing is not expressed in the property relationship, and there is no joint property regime between spouses.[176] Instead, there is a separation of property along with a relationship of mutual dependence that is created by other rights and obligations.[177] For example, the husband is obligated to provide support for his wife and the wife has an obligation to transfer her income to him.

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172. *Id.*

173. *Id.*

174. *Id.* (Rivlin, J., concurring).

175. SC 1/50 Sidis v. Registrar of Jerusalem Execution Office 8 PD 1020, 1130 [1954] (Isr.).

176. *See* Maidi S. Katz, *The Married Woman and Her Expense Account: A Study of the Married Woman's Ownership and Use of Marital Property in Jewish Law*, *in* 13 JEWISH L. ANN. 101, 101-09 (Berachyahu Lifshitz ed., 2000).

177. *Id.*

In Jewish religious law, the consent of the spouses is sufficient to allow for dissolution of marriage.[178] But when there is no consent, grounds for divorce are required.[179] Some grounds for divorce are not dependent upon the behavior of the spouse, such as disabilities and illnesses, and others are dependent upon proof of fault, such as the inappropriate behavior of the spouse.[180]

There is a correlation between the influence of fault on the divorce laws themselves and its influence on the property relations between spouses. Behavior that causes the destruction of family life leads to economic sanctions against the individual at fault. The treatment of fault is not gender neutral. Asymmetry exists between the consequences of the extramarital relationships of a woman and those of a man. When the wife is proven to be at fault, her husband is obligated to divorce her.[181] If the court rules for divorce based upon two witnesses, the woman loses her *ketubah* (her financial rights upon divorce under the Jewish marriage document), her alimony, and – of course – her property that has always been in the sole possession of her husband.[182] In contrast, when a husband is disloyal, the only sanctions are the loss of his wife's handiwork and her income.[183]

IV. THE MODERN THEORETICAL RATIONALES FOR JOINT PROPERTY

A. The Joint Property Principles

Aside from the clear ruling in Israeli court decisions that fault is not to be weighed in property distribution, no other explanations are given. This may be due to the delicate and fragile nature of family law in Israel, in which the separation of church and state is not applied and legislation imposes religious norms upon the general secular public. For example, divorce proceedings are determined by religious law, in which fault is a primary consideration. The issue of property is determined by civil law, which differs from religious law in this regard. Civil courts recognized that extramarital relationships are given significant weight in divorce proceedings, and a particular remedy is provided to the party who was harmed, so the courts viewed themselves as exempt from compensating for that harm through the property dis-

178. Kimberly Scheuerman, *Enforceability of Agreements to Obtain a Religious Divorce*, 23 J. ACAD. MATRIMONIAL LAW. 425, 427 (2010).

179. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 364-66 (1999).

180. *See id.* at 365-66.

181. Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract, and the First Amendment*, 51 MD. L. REV. 312, 324 (1992); *Mishneh Torah*, *Ishut* 24:17; *Shulchan Aruch*, *Even Haezer* 11:1.

182. *See Mishneh Torah*, *Ishut* 24:16-18; *Shulchan Aruch*, *Even Haezer*, 115:5; PDR 8, 354.

183. CA (Jer) 755/05 Anonymous v. Anonymous (Dec. 5, 2005), Nevo Legal Database (by subscription) (Isr.).

tribution proceeding. In contrast, under the laws in the United States, extramarital relationships are not weighed at all in the divorce proceeding.[184] For that reason it is more appropriate for the legal systems in the United States to compensate for this fault by weighing extramarital relationships in property distribution.

However, aside from religious considerations, it is worthwhile to examine the modern rationales for joint property between spouses as reflected in the Israeli legal system. These rationales are also relevant to the American legal systems. The rule of joint property in Israel was created by court decisions. At first, it was defined as follows: "When there is no agreement, or when the intent of the parties at the time of the purchase is unclear, the court attributes to them the intention that the property will belong to both of them in equal portions."[185] Sharing is characterized by complete and "equal division" from the beginning of the marital relationship.[186] At first, the joint property rule was built on two central elements: the existence of a normal marital life (mutual respect, no violence, taking care for each other, etc.) and a joint effort.[187] In later years, the focus transferred from the element of normal marital life to the element of joint effort. With time, this element essentially required that a couple live together under one roof.[188] Ultimately, the joint property rule is a legal tool intended to create an exception to the general property laws and the laws of evidence. Without the joint property tool, spouses would be subject to a separation property regime.

In early decisions, courts based the joint property rules on a contractual rationale, setting forth an implied agreement between the spouses.[189] Under this implied agreement, spouses intended to share their rights equally.[190] The

184. *See, e.g.*, Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 15 (2012) (noting that "concepts of sexual fault no longer formally determine[] the status relationships of men and women in divorce"). *But see In re* Blanchflower, 834 A.2d 1010, 1011-13 (N.H. 2003) (reiterating that adultery is grounds for a fault-based divorce); Crawford v. Crawford, No. 259108, 2006 WL 1330321, at *1 (Mich. Ct. App. May 16, 2006) (holding that an extramarital relationship – even if nonsexual in nature – can be the primary reason for a divorce).

185. CA 300/64 Berger v. Dir. of Estate Tax 19(1) PD 240, 245 [1965] (Isr.); MENASHE SHAVA, PERSONAL LAW IN ISRAEL, vol. 1, 191-96 (2001).

186. *See* The Spouses Property Relations Law, 5733-1973, 27 LSI 276 § 3 (1973) (Isr.). This system of property distribution is different from the system of "equitable distribution," which is customary in many of the states in the United States. *See supra* Part I; *see also* Shahar Lifshitz, *Past Property, Future Property, and the Philosophy of the Presumption of Joint Property*, 34 HEBREW U. L. REV. 627, 655 (2004).

187. *See* CA 52/80 Shahar v. Fridman 38(1) PD 443, 458 [1984] (Isr.). Under these conditions, the joint property principles may also apply to unmarried spouses who are living together. *See id.*

188. *See* CA 234/80 Gadasi v. Gadasi 36(2) PD 645, 650 [1982] (Isr.).

189. *See Shahar*, 38(1) PD 443.

190. *See Berger*, 19(1) PD 240.

courts investigated those intentions,[191] and the element of a normal marital life suited the contractual rationale. However, in a strained marital relationship, that rationale could not easily serve as a solid theoretical basis for the joint property rule. Furthermore, the investigation of the spouse's intentions was not a simple task.[192] And it was even more complicated when the "intention attributed to the parties" actually focused on "the intention attributed to the registered owner of the property."[193] In addition, critics argue that the contractual rationale is based on a fiction: the court attributes intentions to the parties based on its evaluations, which are actually a matter of legal policy.[194]

The limitations of the contractual rationale motivated the courts to adopt the proprietary rationale.[195] Courts' investigations into the parties' intentions became less frequent.[196] The proprietary rationale led to a focus on the element of joint effort, and this focus brought the joint property rule closer to a sort of statutory sharing regime. Eventually, the joint property rule began to reflect the law of trusts or equity.[197] This transition was impacted by the social perception of marriage as a free relationship between two spouses, based on equality and preservation of individual autonomy.[198]

The distinction between the contractual rationale and the proprietary rationale is not a dichotomy.[199] The second rationale did not completely replace the first, and in later decisions, one can still find statements relying upon the contractual construction.[200] Courts' movement between the rationales is not one directional, but swings back and forth.[201] These divergent

191. The investigation is to determine the intentions of the spouses during the marriage and not at the time of its dissolution. *See, e.g.*, CA 651/79 Salman v. Salman 36(1) PD 554, 555 [1982] (Isr.).

192. Indeed, in some cases it was argued that it was a fiction. *See, e.g.*, CA 1558/94 Nafisi v. Nafisi 50(3) PD 573, 617 [1996] (Isr.).

193. *See, e.g.*, CA 135/68 Bareli v. Dir. of Estate Tax, Jerusalem, 23(1) PD 393, 398 [1969] (Isr.); CA 529/76 Svirski v. Svirski 31(2) PD 233, 237 [1977] (Isr.).

194. *See, e.g.*, CA 253/65 Briker v. Briker 20(1) PD 589, 597 [1966] (Isr.); CA 77/77 Rahabi v. Rahabi 33(1) PD 729, 734 [1979] (Isr.).

195. *See* Lifshitz, *supra* note 186, at 691 (arguing that this change began in the beginning of the 1980s). For more about the rejection of the contractual rationale as the real rationale for joint property, see ARIEL ROSEN-ZVI, ISRAEL FAMILY LAW: THE SACRED AND THE SECULAR 225, 231 (1990).

196. *See e.g.*, *Nafisi*, 50(3) PD at 605.

197. *See Briker*, 20(1) PD at 595; *see also* HANOCH DAGAN, PROPERTY AT A CROSSROADS 468 (2005).

198. *See* CA 8791/00 Shalem v. Twinco ¶¶ 8-11 (Dec. 13, 2006) (Isr.); CA (Jer) 4623/04 Anonymous v. Anonymous ¶¶ 7-10 (Oct. 8, 2004) (Isr.).

199. *See* Lifshitz, *supra* note 186, at 634 (arguing that the decisions of the 1960s show that the contractual rationale was more dominant then, while in the 1980s the decisions were more suited to the model of the judicial presumption). *But see id.* at 695 n.242 (indicating that the decisions are not always consistent).

200. *See, e.g.*, CA 630/79 Liberman v. Liberman 35(4) PD 359, 368 [1981] (Isr.); CA 663/87 Natan v. Grayner 45(1) PD 104, 109 [1990] (Isr.).

201. *See, e.g.*, CA 75/79 Avrahami v. Yisraeli 34(2) PD 216 [1980] (Isr.).

rationales lead to conflicting results under the joint property rule. Ultimately, the joint property regime became a combination of these two rationales.[202] Consideration of both rationales allowed for courts to reach proper results.[203]

With the joint property principles, Israeli law adopted the concept of equal distribution. This concept takes an approach opposite to that of the separation of property, which was customary in most of the United States before the no-fault divorce revolution and is still applied under Jewish religious law. In between separation of property and equal distribution is the concept of equitable distribution. The above discussion of American law demonstrates the system of equal distribution. This system asserts that family property is joint property from the day that it is acquired and gives less weight to fault in determining property distribution. In contrast, fault is more relevant under the system of equitable distribution, which views family property as separate property and provides for property sharing only at the end of the marriage. The joint property rule in Israel is based on the concept of equal distribution, making fault ostensibly less relevant. But the joint property rule in Israel is the result of deeper theoretical bases. Thus, there is a need to examine the question of consideration of moral fault in light of these bases.

As stated, the fundamental theory supporting the joint property rule is the contractual rationale. The primary purpose of property arrangements between spouses is fulfilling the will of the spouses. The law's role is to investigate the spouses' presumed intentions and to determine property distribution that reflects their will. This approach, based on both economic and psychological logic, assumes that spouses who conduct a "normal" marital life in which each contributes to the family effort would agree on a joint property arrangement.[204] The determination of the nature and content of the joint property arrangement is therefore not a normative process, but actually a factual one in which the law identifies the distribution that best reflects the couple's presumed intention, even if this distribution does not seem just or fair to the court.

Is the contractual rationale indifferent to an extramarital relationship? It seems that the answer is no. The joint property rule is a factual matter founded on, among other considerations, factual assumptions based on logic and common sense. One may assume that an important factor such as an extramarital relationship would impact not only the content of the property arrangement, but also its very existence. The court decisions that adopted the contractual rationale determined that, in order to determine an intent to create joint property, two elements must be fulfilled – a normal marital life and joint

202. CA 806/93 Hadari v. Hadari 48(3) PD 685, 694 [1994] (Isr.).

203. Thus, for example, this rationale assisted in including business property in joint property. *See* CA 488/89 Nofarber v. Nofarber 44(4) PD 293 [1990] (Isr.). The proprietary rationale also helped to include retirement and pension properties in the joint property. *See* CA 809/90 Lidaei v. Lidaei 46(1) PD 602, 611 [1992] (Isr.).

204. *See* Lifshitz, *supra* note 186, at 655.

effort.[205] The joint effort requirement can be met by active participation in providing family income and carrying out household work.[206] The existence of an extramarital relationship is ostensibly irrelevant to this requirement. After all, there could be instances in which an adulterous spouse also makes an impeccable contribution to family income or to the household work. However, that is not the case with respect to the requirement for a normal marital life. The logic of this requirement is that the willingness of spouses to create joint property is integral to their marital life. One may assume that the better their marital life, the greater their willingness to create joint property. In contrast, spouses who do not have a normal marital life will not be willing to deepen their commitments by creating an economic joint property relationship separate from their personal one.

The question that arises is whether an extramarital relationship can coexist with a normal marital life, or whether the existence of an extramarital relationship is in itself sufficient to demonstrate that a normal marital life does not exist. A review of case law does not provide a clear answer to this question. When the contractual rationale is the theoretical basis, it seems very difficult to establish full property sharing with the existence of an extramarital relationship, for the great majority of people will not agree to share their property with their spouses if they know that their spouses are breaching their trust. An affair could very well be considered a fundamental breach of contract that entitles the injured party to cancel the contract.[207] Therefore, it seems that judges who implement the pure contractual rationale should reexamine the consideration of extramarital relationships. Moreover, the rulings that extramarital relationships exclude external property from joint property add further difficulty to the contractual rationale.

The additional rationale for the joint property rule is the proprietary rationale.[208] In the early 1980s, values from property law – especially the value of labor – began to penetrate the marital property laws and influence their design. This emphasis on labor suggested that property should be given to the person who worked to create it, as a reward for that person's investment

205. 2 JOSHUA WEISMAN, PROPERTY LAW – OWNERSHIP AND PARTNERSHIP, 182 (1997).

206. *See* CA 300/64 Berger v. Dir. of Estate Tax, 19(1) PD 240, 246 [1965] (Isr.) ("The required joint effort is not necessarily financial participation of each of the spouses that comes from income or from his earnings. But even the case in which a wife does not work outside of her home but manages the household and contributes her part to the support of the family including educating the couple's children, may be viewed as an effort on her part no less than the husband's effort who earns an income from work.").

207. *See* Contracts (Remedies for Breach of Contract) Law, 5731-1970 §§ 6-7 (1970) (Isr.), *available at* http://www.israelinsurancelaw.com/contract-laws/contracts-remedies-for-breach-of-contract-law.html.

208. *See* ROSEN-ZVI, *supra* note 195, at 232 ("One cannot also ignore that each element has the ability to influence the legal significance of the other. An extremely atypical marital life could shed a different light on factual circumstances of joint effort.").

in its production. The application of this concept to marital property laws should lead to the implementation of a joint property – rather than separate property – regime. In the factual-economic reality, both spouses contribute joint efforts to producing and improving family property, so this property should be awarded to each spouse. The increased significance of the element of "joint effort" – and the decreased significance of the element of "normal marital life" – is consistent with the labor theory that emphasizes effort in creating and recognizing ownership interest.[209] An additional influence of the labor theory is in broadening the scope of property included in the joint property rule with respect to property acquired during the marriage, and narrowing it with respect to property obtained prior to the marriage, without joint effort.[210] In addition, the labor theory impacted the transition of the joint property regime from a regime based on consent of the parties to a regime originating in law.[211] The judges supporting the value of the work as the basis for joint property applied the joint property rule even where it was clear that both spouses strictly observed complete separation of their financial matters.[212]

Does the labor theory enable consideration of sexual fault? One's initial reaction may be negative. This theory focuses only on the effort invested by each spouse, without consideration of the spouses' sexual behavior. However, careful study reveals that the answer is not so simple.

First, according to the labor theory and the argument of reward for work invested, the right of a spouse in joint property is reward for that spouse's contribution in creating the property. A closer look at the term "contribution" can better demonstrate the need for considering sexual fault in the labor theory. It may be argued that the term "contribution" in a broader sense relates – not just to the couple's economic relationship – but to the psychological-emotional aspects of the relationship. Creating a supportive environment filled with trust and security also contributes to the creation of property and the production of profits. Thus, when quantifying the contribution of each of the spouses, one should consider, not only the direct economic contributions of housework or income, but also the contributions to the existence, preservation, prosperity, and development of shared married life based on trust, loyalty, and love. This understanding of the term "contribution" will allow for consideration of sexual fault in determining property distribution.

Second, it has been argued that the recognition of the individual's property rights in the fruits of her labor is based, not only on the work that she invested in producing the property, but also on the injustice of transferring it to another person. According to this perception, the recognition of an indi-

209. *See* DAGAN, *supra* note 197, at 463.

210. *See* Lifshitz, *supra* note 186, at 649, 655.

211. *See* CA 686/85 Maharavi v. Maharavi 40(2) PD 631 [1986] (Isr.).

212. *See* Shahar Lifshitz, *Married Against Their Will? A Liberal Analysis of the Institution of Common Law Spouses*, 25 TEL-AVIV U. L. REV. 741, 794-96, 825-29 (2002).

vidual's property rights can be based on values of justice and fairness.[213] Application of these values to the rules of property between spouses leads to the following argument: both spouses contribute through the production of property and profits, so it is appropriate and just that such property and profits be jointly owned by each spouse. The contribution of the two spouses is what justifies recognition of a joint property regime. Indeed, review of case law from the 1990s demonstrates that the courts based the joint property rule on principles of justice.[214] Understanding the joint property regime through this lens opens a significant door to weighing sexual fault in determining property distribution. According to this approach, just as values of justice were the initial justification for recognizing the spouse's right in joint property, they should also influence the scope and content of this right.

Thus, the spouse's sexual fault should restrict the scope of that spouse's right in joint property, whether by cancelling it entirely, restricting what property is included, or distributing property unequally. In a broader sense, it seems that values of justice allow for weighing this fault while shaping the content of the joint property regime.[215] Therefore, the question that arises is why the courts refused to consider sexual fault. The answer is perhaps in the well-known understanding that the meaning of "justice" is somewhat vague and individual judges' views of justice may be subjective. A review of Israeli case law shows that in shaping the contents of the joint property regime, the courts adopted a narrow perception of the word "justice" that relates only to economic fault.[216] However, the vague content of the term "justice" allows for adopting its broader meaning that also considers sexual fault in determining property distribution.[217]

The proprietary rationale is also based on a third value – the value of equality. From the words of Chief Justice Barak in the *Shalem* case, one can identify two rationales for the value of equality.[218] The first is that the joint property rule expresses recognition of the economic contribution of the homemaker to the family's welfare. In this sense, Chief Justice Barak does not consider equality as an independent value, but as a means of promoting an additional value, the value of reward for effort invested in producing the property. The second rationale promotes the value of equality as an independent value with contents of its own – substantive equality and not formal

213. For a similar argument, see Guy Pesach, *The Theoretical Basis for Recognition of Copyright,* 31 HEBREW U. L. REV. 359, 399 (2000).

214. *See* Lifshitz, *supra* note 186, at 699, 702 ("As a result of it, it seemed during this period that the changeover was completed and that the joint property principle was completely based upon the normative values of justice and equality.").

215. *See* CA (Jer) 638/04 H.R. v. R.R. (Jan. 23, 2005) (Isr.).

216. *See, e.g.*, FamC 20964/02 Anonymous v. Anonymous ¶ 9 (Dec. 28, 2009) (Isr.).

217. *See* Weisman, *supra* note 205, at 181.

218. *See* CA 8791/00 Shalem v. Twinco, ¶ 9 (Dec. 13, 2006), Nevo Legal Database (by subscription) (Isr.).

equality.[219] Ostensibly, one might suppose that those who embrace the approach of substantive equality would object to every deviation from equal property distribution based on fault, but that conclusion is not necessarily correct.

The approach of substantive equality applies the Aristotelian principle of equality. According to this principle, equality means treating equals alike and treating those who are different, differently, provided that the differentiation is relevant to the particular circumstances.[220] Thus, in contrast to the approach of formal equality, relating to an individual differently is not necessarily harmful to the value of equality, unless the differentiation is not for relevant reasons. In the context of our discussion, any unequal property distribution is harmful to the value of substantive equality when it is made for irrelevant reasons. The questions are how to determine the relevant reason, and whether sexual fault is a relevant reason that justifies a diversion from equal distribution. These questions are not factual questions, but normative ones. Their answers are derived from, among other things, the attitudes of society with respect to sexual fault. Thus, for example, if it is normatively determined that fault is relevant to property distribution, then the conclusion will be that an unequal property distribution actually fulfills the substantive equality, and does not harm it. If, however, it is determined that sexual fault is not a proper consideration in property distribution, then taking it into consideration will be harmful to substantive equality.

The proprietary rationale is thus based on the values of labor, justice, and equality. We have seen that disputes between spouses do not detract from equal distribution, and, ostensibly, that should also be the rule regarding an extramarital relationship, but it is doubtful whether this comparison is suitable. Some matters reach down to the very foundation of the relationship between spouses. Other matters – even if disturbing and challenging to the marital relationship – do not reach its core. The question is how to categorize extramarital relationships. Does a spouse who conducts an extramarital relationship deserve the exceptional defenses created by case law? When the courts created the rules of joint property, did they envision the disloyal spouse? This doubt is increased by one of the joint property rules: joint property includes the sharing of obligations and debts,[221] except for obligations made in breach of trust (for example, for the purpose of supporting a lover).[222] Case law reveals that there are different types of obligations. Obligations connected to supporting the family are joint, even if they were created by only one of the spouses. But obligations that harm the foundation of the marital relationship are not included in joint property. Accordingly, it should be examined whether a greater burden should be placed on the spouse who

219. *See* Lifshitz, *supra* note 186, at 659.

220. *See* 5 ARISTOTLE, NICOMACHEAN ETHICS (W. D. Ross trans. 2009), *available at* http://classics.mit.edu/Aristotle/nicomachaen.5.v.html.

221. *See Shalem*, CA 8791/00; CA 3002/93 Ben Zvi v. Sitin 49(3) PD 5, 7 [1995] (Isr.); *see also* CA 446/69 Levi v. Goldberg 24(1) PD 813, 820 [1970] (Isr.).

222. *See Levi*, 24(1) PD 813, 820.

requests joint property rights after having harmed the foundation of the marital relationship.

This approach should determine that the rationale does not apply to property registered in the name of the spouse who was disloyal when the property was acquired. The adulterous spouse might be the one to argue that there was no intention to create joint property and might even support this argument with the fact that he participated in an extramarital relationship. This situation could reasonably occur when most of the property is registered in the name of the spouse who participated in the extramarital relationship. Taking fault into consideration might therefore allow him to use his wrongdoing to his own benefit. Under these circumstances, the contractual rationale, based on libertarian thinking and the economic analysis of the law, allows for bringing the claim of estoppel against the spouse at fault, in order to prevent him from raising this argument. The rationale behind the doctrine of estoppel is to protect the innocent spouse's reliance on the representation of the adulterous spouse that the couple has a normal marital life.[223]

The previous paragraphs dealt with the joint property principles and presented thoughts as well as options for considering extramarital relationships in property distribution. These options are more relevant and significant in the second property regime under the Israeli legal system, as set forth in the Property Relations Law. My examination of American law, above, shows that fault is less relevant in a joint property regime than in a property regime of separation. This distinction is to some extent also valid in Israeli law: the Property Relations Law sets forth a regime of separation of property. During the marriage, each spouse is the owner of his or her own property (as in the system of equitable distribution), and the distribution between the spouses occurs only when the marriage ends. In this situation, it is more difficult for the spouse who breaches trust to establish joint rights in property registered in the name of the other spouse.

The rationales of the joint property rule are the major considerations in the question of weighing fault, but other factors need to be considered as well. These factors will be discussed in the following two sections.

B. Different Fields of Law and Extramarital Relationships

In the case of *Anonymous C*, Judge Rivlin raised the difficulty of examining emotional relationships from the contractual perspective.[224] In his opinion, there should be no compensation for emotional harm caused by adultery:

> As is well known, the law does not grant a cause of action for emotional harm involved in divorce proceedings . . . . Similarly, there is

223. This is the classic estoppel. For further discussion, see Menachem Mautner, *"Creators of Risk" and "Risk Victims": Protection of the Reliance Interest in Israel's New Civil Legislation*, 16 HEBREW U. L. REV. 92, 112-13 (1987).

224. CA 5258/98 Anonymous v. Anonymous 58(6) PD 209, 226 [1995] (Isr.) [hereinafter *Anonymous C*] (Rivlin, J., dissenting).

> no remedy in our system for someone who suffered emotional harm due to a spouse's adultery . . . . Indeed the law does not stop at the entrance to the family home, but the law abstains from trying to settle emotional relationships . . . . The deceptive, adulterous spouse, who breaks up a relationship without justification, is perhaps deserving of moral, religious, or social shame, but the person injured by him will have difficulty finding his remedy in law.[225]

Gad Tedeschi notes that the offense of adultery was cancelled in the Israeli legal system with the cancellation of the Ottoman Criminal Law.[226] In contrast, he points out that various countries, such as Switzerland and Germany, include sanctions for adultery in their criminal laws or tort laws.[227] Tedeschi also indicates that although in the past sanctions were gender-based, today such discrimination would be impermissible.[228] Tedeschi writes that there are no sanctions under Israeli law against the adulterous spouse, except for religious sanctions.[229] In one case, a court concluded that it is impossible to determine that an extramarital relationship is either contrary to the reasonable norm of behavior or an act of negligence, and therefore the innocent spouse should not be awarded compensation for damages.[230]

One of the considerations in American law for not weighing fault in property distribution is the availability of bringing a claim under tort law or criminal law. In Israeli law, no such availability exists. The need for such a separate claim strengthens the need to weigh fault in property distribution.

C. The Moral Argument – The Approach of Society Towards Extramarital Relationships

In the *Anonymous C* case, which deals with the validity of a married man's promise to marry another woman, Chief Justice Barak stated:

> There is no doubt that preserving the family unit is part of public policy in Israel . . . . The interest of society supports stable marriage . . . . Nevertheless, throughout the years the perceptions of society have changed with respect to divorce . . . . Even the aversion to an extramarital relationship does not reflect the approach of today's society, and the common law marriage principles will prove it.[231]

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225. *Id.* at 233 (citations omitted).

226. Tedeschi, *supra* note 4, at 294.

227. *See* Tedeschi, *supra* note 4, at 295.

228. *Id.* at 302.

229. *Id.* at 318.

230. *See* FamC 21382/01 B.D. v. B.R. (Oct. 5, 2007), Nevo Legal Database (by subscription) (Isr.).

231. CA 5258/98 Anonymous v. Anonymous 58(6) PD 209, 221 [1995] (Isr.).

Judge Procaccia concurred with Chief Justice Barak: "In recent decades, the western world went through extreme upheavals in basic perceptions of values that are characterized by pluralism in thought and morality together with an increasing recognition of the liberty of the individual to determine his way of life. Those upheavals substantively impact the perceptions of law . . . ."[232]

These words contradict the statements of some American legal experts, who argue that even in modern day society the majority of the population is averse to extramarital relationships.[233] These quotations support the notion that the law affects the moral design of society.[234] The consideration or lack of consideration of extramarital relationships in property distribution sends a social message. Based on this notion, it seems that today Israeli law tends to be tolerant of an extramarital relationship. However, it is difficult to know which came first, "the chicken or the egg." Perhaps case law has evolved and does not reflect the reality in which extramarital relationships will not be considered a breach of trust to be weighed in family property distribution.

D. Proposal for a New Model – The Dominant Cause Model

This Article sets forth various considerations for weighing or excluding fault as a factor in property distribution. Among the factors that favor the consideration of fault are: the required coherency with the modern theoretical rationales for the joint property regime (the contractual rationale and the proprietary rationale based on labor, justice and equality); the absence of other fields of law that can provide a remedy for the harm caused by inappropriate spousal behavior – and courts' lack of motivation to use such cumbersome procedures; moral considerations; and the social message. In contrast are the judicial decisions against weighing fault while determining family property distribution. It seems that the desirable balancing formula is that extramarital relationships be considered in severe circumstances. Such circumstances include those in which extramarital relationships are the cause of the dissolution. When the totality of the evidence shows that the extramarital relationship is the dominant cause of the dissolution, and – disregarding the relationship – the marriage was stable, then the extramarital relationship should be weighed in property distribution. I call this the dominant cause model. But when the extramarital relationship is only one difficulty among others already facing a troubled marriage, then the extramarital relationship should not be weighed in the distribution of property. The consideration of fault in harsh

232. *Id.* at 239 (Procaccia, J., concurring).

233. *See* Morse, *supra* note 12, at 641; *see also supra* Part II.A and sources cited therein.

234. *See also* ATWATER, *supra* note 2, at 16 ("The proscription of extramarital sex is one of the most ancient and stringent cultural rules regulating family life. In Western civilization, it can be traced back at least to early Hebraic society.").

circumstances may better balance the values operating in American and Israeli law.

Some of the approaches in American scholarly literature argue that, due to the emotional impacts of extramarital relationships, such relationships should routinely be weighed in property distribution.[235] I think that, in light of the considerations presented above, such approaches should not be accepted. However, the model I propose will provide protection to the spouse who was harmed and will grant that spouse a greater portion of the property than he or she would have received in customary distribution. It should also be emphasized that this model would operate only as protection for the spouse who was harmed, and would not operate to the harmed spouse's detriment. The spouse who had an extramarital relationship will not be permitted to argue that there was no intent to share property. On the contrary, the consideration will be whether to grant the spouse who was harmed more than the property to which he or she would have otherwise been entitled in a customary distribution.

There is an additional aspect to this model. The spouse who has an extramarital relationship will not be allowed to claim joint rights in the external property of the other spouse even if he or she would be able to do so in a customary distribution. Property that did not result from the couple's joint effort will not be included in the shared property. Such will also be the case when the owner of the external property is the individual that had an extramarital relationship. The law does not have to punish him by transferring his personal property to his spouse. Yet it is possible that the spouse who was harmed will be given a greater portion of property acquired by the couple than he would have received under the customary rules of property division.

Implementation of this model in the United States and Israel might raise questions. The first question is a qualitative one: at what precise point will extramarital relationships be considered severe cases? The second question is quantitative: how should severe extramarital relationships be weighed, and what percentage of property will the individual in such a relationship lose? The third question is: how can the dominant cause of the marriage dissolution be identified? The fourth question is actually derived from the previous three questions: how arbitrary are court decisions when there are no defined tests?[236]

I do not have clear responses for these questions, but note that the lack of consideration of extramarital relationships also raises significant difficulties. The problematic nature of evaluation does not lessen or nullify the right of the injured spouse. Both the Israeli and American judicial systems have

235. *See, e.g.*, Boyd, *supra* note 46, at 624.

236. Thus, for example, the breaking point of the marriage must be determined. From that point on, this sort of behavior will not be considered as having brought the marriage to an end. Clearly, for example, sexual fault after living apart will not be weighed in the same way as sexual fault before the separation. *See, e.g.*, Ferrucci v. Ferrucci, 527 A.2d 1207, 1208 (Conn. App. Ct. 1987); Smith v. Smith, 363 S.E.2d 404, 406, 408 (S.C. Ct. App. 1987).

recently demonstrated that the courts are not deterred from handling complex questions, provided that an individual's rights will not be denied. I am referring to the determination that within property distribution, the personal capital, earning capability, and reputation of each of the spouses must also be distributed.[237] The Israel Supreme Court has noted that, with time, criteria will be formed to assist the evaluation of intangible property.[238] In my opinion, that is also the appropriate approach to our matter.

Nevertheless there is a distinction between the Israeli and American legal systems. The determination of property distribution looks at the past: the law seeks to distribute the property accumulated by the family in the past and to determine with which property each spouse will leave the marriage. The determination of alimony, in contrast, looks into the future.[239] This distinction may be correct with respect to the American legal system and may help us understand the asymmetry between those states that consider fault in the determination of property distribution and those that consider fault with respect to alimony. States that consider fault in property distribution also consider it in determining the amount of alimony.[240] However, even states that do not consider fault in property distribution consider it in alimony, and – in that respect – compensate the spouse who was harmed.[241] This mechanism does not exist in the Israeli legal system. Alimony payments are controlled by the religious law, under which obligations for support terminate with the marriage.[242] Therefore, the need to consider fault in property distribution is even more essential in Israeli civil law.

CONCLUSION

This Article reexamines the issue of weighing extramarital relationships in family property distribution, in light of the current and modern theoretical rationales for the joint property principles. Indeed, this Article examines the modern rationales for joint property principles in both the United States and Israeli legal systems, including the ways in which they relate to extramarital relationships. The United States is divided on this issue. Some states oppose the consideration of fault in marital dissolution and others support it.[243] This Article studies these considerations in detail, presents various scholarly opin-

237. *See* CA (Jer) 4623/04 Anonymous v. Anonymous ¶ 16 (Oct. 8, 2004), Nevo Legal Database (by subscription) (Isr.) (illustrating that the Israeli system preceded other systems); Kelly, *supra* note 25, at 69-70.

238. CA (Jer) 4623/04 Anonymous v. Anonymous ¶¶ 19, 22 (Oct. 8, 2004), Nevo Legal Database (by subscription) (Isr.)

239. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 99 (2004).

240. *See supra* note 70 and accompanying text.

241. *See supra* note 70 and accompanying text.

242. *See supra* Part III.C.

243. Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 220 (2010).

ions on the matter, sets forth factual data with respect to the various states, and uses all of this as a normative basis for a renewed analysis of the issue.

This Article raises doubts as to whether the exclusion of all consideration of fault, as established in the legal systems in several of the states and in Israel, is consistent with theoretical rationales for joint property principles. In its beginning, the Israeli joint property principles required two elements, a normal marital life and a joint effort.[244] The joint property principles were based upon the contractual rationale, i.e., an implied agreement between each spouse to share property.[245] Later, the joint property rule became based upon the proprietary rationale.[246] This rationale is based upon the value of labor, according to which each spouse is entitled to half of the financial worth of the property based on the work that spouse invested in it. Other bases of the proprietary rationale are the values of justice and equality. The value of equality subdivides further into the values of reward for effort in creating property and the independent value of equality. This Article demonstrates that a broad interpretation of these bases will lead to the conclusion that fault should be considered in the determination of property distribution. In addition, it is essential to take into account that there is actually no other way to compensate the spouse who has been harmed by an extramarital relationship. Other fields of law do not provide an appropriate channel for this purpose because proceedings are complicated and lack a clearly defined statutory remedy.

In conclusion, this Article proposes a balancing model both for the American and Israeli legal systems. I call this the dominant cause model. According to this model, fault should be considered in property distribution in severe circumstances. Severe circumstances will be defined as occurring when an extramarital relationship was the dominant cause that brought about the end of the marriage. If the marital relationship was unstable anyway, then an extramarital relationship will not be a factor in determining property distribution. Aside from that, external and personal property should remain excluded from joint property, even when they belong to the individual who conducted the extramarital relationship.

The implementation of this model will also present the United States and Israeli legal systems with several challenges in evaluating the dominant cause for dissolution of the marriage: the percentage of property affected by each incident and the concern of arbitrariness. However, both legal systems have already addressed these sorts of challenges in other contexts. In such contexts they require that an individual not be deprived of his or her rights due to difficulties of evaluation. In addition, appropriate protection is given to the spouse harmed by the unique family circumstances. This shift in the legal systems should facilitate re-examination of the consideration of fault in property distribution as well.

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244. *See supra* notes 185-188 and accompanying text.
245. *See supra* notes 189-194 and accompanying text.
246. *See supra* notes 195-198 and accompanying text.